Petition

81-1914

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

HAROLD PEARSON, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, HAROLD PEARSON, JR., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (see Appendix A) entered on the 11th day of February, 1982 affirming his conviction in the United States District Court for the Eastern District of New York of conspiracy, possession of

cocaine with intent to distribute and importation of cocaine.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a jury instruction, given after the general instruction on credibility of witnesses, singling out Defendants as witnesses and specifying that the deep personal interest which every defendant has in the result of his case creates a motive for false testimony to such an extent that it may seriously affect the credence thereof, is unfair and violative of a Defendant's due process rights.

2. Whether the delivery of such a jury instruction constitutes plain error calling for review by this Court.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were the UNITED STATES OF AMERICA, as Appellee, and HAROLD PEARSON, JR.,

Petitioner, herein, and NARVIK JONELL DURAND, Defendants/Appellants.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit has not been reported as of the date hereof, but a copy thereof is printed in Appendix A hereto.

JURISDICTION

On February 11, 1982, the Court of Appeals entered judgment affirming Petitioners' conviction in the United States District Court for the Eastern District of New York of conspiracy, 21 USC

§846, possession of cocaine with the intent to distribute, 21 USC §841(a)(1), 18 USC §2, and importation of cocaine, 21 USC §§952(a), 960(a)(1), 18 USC §2. (Appendix A) The jurisdiction of this Court is invoked under Title 28 USC, §1254(1).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. The following constitutional provision is involved in this case:

> Nor shall any person... be deprived of life, liberty, or property, without due process of law... **United States Constitution, Amendment V.**

B. The following statutory provision is involved:

> In trial of all persons charged with a commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any states, district, possession or tertitory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him. 18 USC §3481.

1/ No other Petitioner is involved in this Petition.

STATEMENT OF THE CASE

On February 11, 1982, a panel of the United States Court of Appeals for the Second Circuit affirmed the conviction of HAROLD PEARSON, JR. of conspiracy (21 USC §846) possession of cocaine with intent to distribute (21 USC §841(a)(1), 18 USC §2), and importation of cocaine (21 USC §§952(a), 960(a)(1), 18 USC §2)

Petitioner and two others had been convicted of such offenses in the United States District Court for the Eastern District of New York, the Honorable Thomas C. Platt presiding. Such convictions were obtained largely through the testimony of an alleged accomplice, a Mr. Adams, who, at the time of the trial, had pleaded guilty in independent proceedings to certain criminal violations connected with those involving Petitioner and his two co-defendants, but who had not been sentenced at the time of the trial, having struck a

bargain with the United States Attorney's Office for the Eastern District of New York to render testimony in the criminal proceedings against Petitioner and his co-defendant in exchange for favorable recommendations at the time of his sentencing.

At the close of the evidence, the District Court instructed the jury. Pertinent to this Petition for Certiorari are the following facts concerning the District Court's instructions concerning the credibility of the witnesses:

1. The Court first delivered a general instruction concerning the credibility of all witnesses which did not differentiate the witnesses by class. RT.[2] p. 992, ln. 14 through p. 993, ln. 7. (Appendix B-1)

2. After delivering this general credibility instruction, the Court rendered an instruction concerning accomplice testimony. This instruction, while informing

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2/ "RT" refers to the Reporter's Transcript.

the jury that the testimony of an accomplice should be "...received with great caution and weighed with great care...," did not explain why an accomplice's testimony should be so viewed, or differentiate the interest or motive of an accomplice who has given testimony in accordance with the terms of an agreement with the prosecutor from the interests and motives of non-accomplice witnesses. RT, p. 993, ln. 24 through p. 994, ln. 15. (Appendix B-2)

3. After delivering the aforesaid two instructions, the District Court delivered a separate instruction concerning the credibility of defendants as

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witnesses.[3] This instruction imputed to such witnesses a deep personal interest, of a character possessed by no other witness, which "...creates a motive for false testimony..." and seriously affects

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3/ A defendant who wishes to testify, however, is a competent witnesses; and the defendant's testimony is to be judged in the same way as that of any other witness.

The law permits a defendant, at his own request to testify on his own behalf. The testimony of individual defendants is before you. You must determine how far it is credible. The deep personal interest which every defendant has in the result of his case should be considered in determining the credibility of his testimony. You are instructed that interest creates a motive for false testimony; that the greater the interest the strong [sic] is the temptation, and that the interest of a defendant is of a character possessed by no other witness and is, therefore, a matter which may seriously effect [sic] the credence that should be given to his testimony.

However, I also charge you with equal force that a defendant's vital interest in the outcome of his trial is not inconsistent with his ability to render truthful testimony.

the "credence" which should be given to such testimony. The Court then instructed the jury that a Defendant's "vital interest" in the result of the case would not, however, be "...inconsistent with his ability to render truthful testimony." RT p. 995, ln. 19 through p. 996, ln. 15. (Appendix B-3)

It appears from the record that Petitioner did not object to the charge to the jury.[4]

Following his conviction, Petitioner and one of his co-defendants, NARVIK JONELL DURAND, appealed to the United States Court of Appeals for the Second Circuit. As one of his grounds of appeal, Petitioner's co-defendant asserted that the instruction heretofore referred to

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4/ Counsel now representing Petitioner with respect to this Petition for Certiorari did not represent him in connection with the District Court and Court of Appeals proceedings.

concerning defendants as witnesses deprived him of a fair trial. As his ground of appeal, Petitioner asserted that the evidence against him was insufficient to support the jury's verdict.

On February 11, 1982, the Opinion and Judgment of the Court of Appeals was entered. It found no merit to the contention by Petitioner's co-defendant that the "defendant as witness" jury instruction was improper, and affirmed Petitioner's conviction upon a review of the evidence.

Petitioner has now petitioned to this Court asserting that the "defendant as witness" jury instruction, when considered in light of the general credibility instruction and the accomplice credibility instruction, was violative of his constitutional rights to due process of law. Petitioner is further asserting in his Petition that even though he neither preserved his objections for appeal nor

raised them on appeal, the instructions of the District Court were so infused with plain error as to call for an independent review by this Court. Fed.R.Crim.P. 52(b).

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The United States District Court for the Eastern District of New York exercised jurisdiction in the first instance pursuant to the provisions of 18 USC §3231.

REASONS FOR GRANTING THE WRIT

A. The emphasis of a purported motive on the part of Petitioner to give false testimony was violative of his rights to due process of law.

The "minimal standards" of the concept of due process of law require a fair hearing. **In re Oliver,** 333 U.S. 257, 92 L.Ed 682, 68 S.Ct. 499 (1947); **Tumey v. Ohio,** 273 U.S. 510, 71 L. Ed 749, 47 S.Ct.

437 (1926). Due process of law mandates a fair trial and a fair tribunal. **In re Murchison,** 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1954). And, one of the most basic concepts of fairness in the American jurisprudential setting is that a jury called upon to determine the fate of an accused be instructed in such a fashion that the basic premise that the accused is innocent until proven guilty is made clear. **Taylor v. Kentucky,** 463 U.S. 478, 56 L.Ed 2d 468, 98 S.Ct. 1930 (1978)

The decision of the Court of Appeals which is the subject of the instant Petition upheld a jury instruction in this case which clearly singled out the testimony of Petitioner and his co-defendants as being suspect because of their "deep personal interest" in the outcome of the case. Only to the Defendants were specific interests and motivations attributed, calling into question the truthfulness of

their testimony; and although the testimony of the accomplice was referred to by the trial court in its instruction that it should be carefully considered, no mention at all was made to the jury of the obvious interest of the accomplice in obtaining for himself after the trial a favorable recommendation by the United States Attorney's Office to his sentencing Judge.

In its opinion affirming Petitioner's conviction, the Court of Appeals cited the case of **United States v. Hernandez,** 588 F.2d 346 (2d Cir. 1978) as standing for the proposition that jury instructions similar to that delivered in this case have long been upheld. Indeed, **Hernandez, supra,** construed this Court's decision in **Reagan v. United States,** 157 U.S. 301, 39 L.Ed. 709, 15 S.Ct. 610 (1895) as placing this Court's "imprimatur" upon such instructions.

Petitioner would respecfully submit that **Reagan, supra,** has been misread. To the extent that it still embodies this Court's view of what constitutes fairness according to traditional notions of fair play and substantial justice, it is supportive only of the proposition that mention may be made of the "deep personal interest" that a testifying defendant has in the outcome of the case, not the notion that a trial court may instruct the jury that such a deep personal interest "...creates a motive for false testimony... and is, therefore a matter which may seriously effect (sic) the credence that should be given to his testimony." (See Appendix B-3)

In **Reagan, supra,** the instruction given to the jury was in pertinent part as follows:

> You should especially look to the interest which the respective witnesses have in the suit or in its

> result. Where the witness has a direct personal interest in the result of the suit, the temptation is strong to color, pervert or withhold the facts. The law permits the Defendant, at his own request, to testify in his own behalf. The Defendant here has availed himself of this privilege. His testimony is before you and you must determine how far it is credible. The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit.

Thus, while the instruction approved in **Reagan, supra,** did refer to the "deep personal interest" of a testifying defendant as being worthy of consideration, it did not single out Defendants alone as having a motive to falsify their testimony. Such a "temptation" was attributed to all witnesses with direct personal interest, not just to Defendants as in this case.

Rather than singling out the Defendant as a witness unworthy of belief, **Reagan, supra,** went to great lengths to

place testifying defendants on an even plane with other witnesses:

> Assuming the position of a witness, he is entitled to all its rights and protections, and is subject to all its criticisms and burdens...
>
> It is within the province of the Court to call the attention of the jury to any matters which legitimately affect his testimony and his credibility. This does not imply that the Court may arbitrarily single out his testimony and denounce it as false. The fact he is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent effects the question of credibility. It is, therefore, a matter properly to be suggested by the Court to the jury. But the limits of suggestion are the same in respect to him as to others. **Reagan, supra,** at 305.

Applying such principles, the **Reagan** Court concluded as follows:

> Tested by these rules we see in the instruction objected to nothing of which complaint can reasonably be made. In the first part it lays down a general rule, applicable to all circumstances, and then in the latter part simply calls attention to the fact that the Defendant has a deep personal interest in the result of the suit, and that that should be considered by the jury. **There is no**

> declaration nor intimation that the Defendant has been untruthful in his testimony. There is only a reference to the jury of the matter of credibility coupled with the declaration that interest in the result is a circumstance to be weighed in its determination. (Reagan, supra, at 311; emphasis supplied)

In this case, the District Court went far from simply referring to the deep personal interest of Petitioner. The District Judge in fact intimated that Petitioner's deep personal interest rendered his testimony untruthful.

Petitioner had the right to present his case (See **Washington v. Texas**, 388 U.S. 14, 18 L.Ed. 2d 1019, 87 S.Ct. 1920 (1967) -- accused's right to present his own case is a "fundamental element of due process of law"), and he had the statutory right to take the stand as a witness and to be considered a competent witness in so doing. 18 USC §3481. Petitioner also had the fundamental right during the proceedings in the District Court to the

presumption of innocence until proof of guilt. **Taylor v. Kentucky, supra.** The instruction at issue effectively deprived Petitioner of these rights; in essence, the jury was not only advised to take his testimony with a grain of salt, but was also practically instructed that his testimony was presumably false. Under these circumstances, the jury would certainly question the presumption of innocence, for one presumed to be innocent would also be presumed to not have a motive to testify falsely.

At bottom, Certiorari should be granted in this case not only because of the manifest unfairness to Petitioner in permitting a jury so charged to determine his lot, but also to permit this Honorable Court to consider whether or not one of its decisions of nearly a hundred years ago has been and is now being construed in such a manner as to sanction a clear and

full departure "...from the accepted and usual course of judicial proceedings..." **Rules of the Supreme Court, Rule 17.** In this connection, one recent indication that the type of instruction given in this case may well transcend current concepts of fairness is set forth in the following taken from the Opinion of Blackmun, J, in **Taylor v. U.S.,** 390 F.2d 278 (8th Cir. 1968), cert. den. 393 U.S. 869, 21 L.Ed 2d 137, 89 S.Ct. 155, where an instruction not nearly as potentially damaging as the one at bar was attacked:

> We do not hesitate to observe, however, that the continuing and frequent attack on an instruction of this kind indicates that its use leaves defense counsel with a troubled mind. We suspect that this discomfort would be alleviated if the defendant were included by reference in the Court's general instructions as to all witnesses. We would prefer that the defendant not be singled out. His interest is obvious to the

> jury. A general reference, such as 'including the defendant', should suffice... (**Taylor, supra,** at 285.)[5]

Reagan, supra, may very well stand as authority for reference to the "deep personal interest" of a defendant by trial Judges in explaining to juries how they should consider a defendant's testimony. The point, however, is that that case is not simply being read for that proposition, but also for the principle that the

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5/ cf. **Armstead v. U.S.**, 347 F.2d 806 (DC Cir. 1965), where Circuit Judge Edgerton, in a separate opinon accompanying a per curiam opinion, condemned the trial court's action of prohibiting the prosecutor from using the term "Mr." in addressing or referring to the defendant:

> It seems to us that by putting the defendant in a different category from other witnesses, and forbidding the prosecutor to address him as Mr. Armstead, the District Judge encroached on the jury's function in a way which cannot be reconciled with the fundamental principle that defendants are presumed to be innocent until they are proved guilty beyond a reasonable doubt. **Armstead, supra,** at 807.

trial Court may impugn a testifying defendant's integrity by attributing to him or her a motive to give false testimony, a motive of a nature far greater than that of any other witness.

B. The delivery of the jury instruction singling out Petitioner and his co-defendants as witnesses under the circumstances present in this case constituted a plain error calling for review by this Court even though such error was not raised by Petitioner below.

Petitioner is cognizant of the fact that the general rule is that failure to object to the charge to the jury constitutes a waiver of objections. **Fed. R. Crim. P. 30.** However, it is also the law that Courts of Appeals and this Court are empowered to notice "plain error" even though not the subject of objection at the time of purported commitment. **Fed. R. Crim. P. 52.**

Among the factors which have been considered by Appellate Courts in determining whether or not an error is considered plain for purposes of reviewability is whether or not a proper and timely objection at trial would have cured the error. **United States v. Katz**, 601 F.2d 66 (2nd Cir., 1979) In this case, the instruction singling out Petitioner and his co-defendants was one that the trial judge had given on previous occasions with the approval of his Circuit. (See **United States v. Hernandez**, 588 F.2d 346 (2nd Cir., 1978) cited by the Court below in affirming the conviction of one of Petitioner's co-defendants, Narvik Jonell Durand, who did raise the instruction question below.) Consequently, since the practice of giving the instruction at issue herein or a substantial equivalent thereto appears to have been well settled in the Second Circuit, it is

highly probable that an objection would have been futile. Indeed, the error was raised by Petitioner's co-defendant, Mr. Durand, without consequence.

CONCLUSION

For the foregoing reasons, Petitioner HAROLD PEARSON, JR. respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming his criminal convictions.

DATED this 9th day of April, 1982.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of February, one thousand nine hundred and eighty-two.

PRESENT: HONORABLE THOMAS J. MESKILL,
Circuit Judge,
HONORABLE RICHARD J. CARDAMONE,
Circuit Judge
HONORABLE JAMES S. HOLDEN,
District Judge*

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	
	)	DOCKET NOS.
vs.	)	81-1299
	)	81-1305
HAROLD PEARSON, JR. and	)	81-1307
NARVIK JONELL DURAND,	)	
	)	
Defendant-Appellants.	)	
	)	

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

Harold Pearson, Jr. and Narvik Jonell Durand appeal from judgments of the United States District Court for the Eastern

* Honorable James S. Holden, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

District of New York, Platt, J., convicting them after a jury trial of conspiracy, 21 USC §846 (1976); possession of cocaine with the intent to distribute, 21 USC §841(a)(1)(1976), 18 USC §2 (1976); and importation of cocaine, 21 USC §§952(a), 960(a)(1) (1976), 18 USC §2 (1976). Durand challenges the trial court's admission of certain testimony and one aspect of the court's charge to the jury. Pearson alleges that the evidence against him was insufficient to support the jury's verdict.

Durand argues that the trial court abused its discretion in refusing to exclude from evidence a witness' statement suggesting that Durand had previously engaged in cocaine smuggling. The only ground stated on the record for the trial court's ruling is that Durand's lawyer violated the trial court's rules by failing to stand when objecting. Durand claims that the witness' statement was damaging "similar act" evidence which was excluded under Fed. R. Evid. 403 because its prejudicial effect substantially outweighed its probative value.

There is no merit in Durand's argument. The trial court announced in its rules of conduct before the trial began and all counsel were aware that failure to stand when objecting would be ruled a waiver of the objection. A trial judge has broad discretion in the conduct of the trial and "we should not overrule the exercise of that discretion unless we are convinced that the ruling of the court was prejudicial." United States v. Blackwood, 456 F.2d 526, 429 (2d Cir.), cert. denied, 409 U.S. 863 (1972) (quoting Foster v. United States, 282 F.2d 222,

224 (10th Cir. 1960)). We are not so convinced here. The evidence against Durand was substantial and Durand's alleged prior cocaine dealings were brought out in other unchallenged testimony. We do not believe that the challenged evidence affected the verdict in this case.

Furthermore, even if Durand's attorney had stood up to object to the "similar act" testimony, the objection would have been properly overruled on the grounds that a statement against a party, if offered by a coconspirator of that party, is properly admissible and not hearsay when the statement arises during the course or is in futherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E).

Durand contends that the following jury instruction denied him a fair trial:

> A defendant who wishes to testify, however, is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness.
>
> The law permits a defendant, at his own request to testify on his own behalf. The testimony of individual defendants is before you. You must determine how far it is credible. The deep personal interest which every defendant has in the result of his case should be considered in determining the credibility of his testimony. You are instructed that interest creates a motive for false testimony; that the greater the interest the strong [sic] is the temptation, and that the interest of a defendant is of a character possessed

> by no other witness and is, therefore, a matter which may seriously effect [sic] the credence that should be given to his testimony.
>
> However, I also charge you with equal force that a defendant's vital interest in the outcome of his trial is not inconsistent with his ability to render truthful testimony.

This Court has repeatedly approved similar instructions. E.g., United States v. Hernandez, 588 F.2d 346, 349-50 (2d Cir. 1978); United States v. Rucker, 586 F.2d 899 (2d Cir. 1978.). There was no error in the jury charge.

We have examined Peason's claim of insufficient evidence and have found it to be without merit. Viewed in the light most favorable to the government, as it must be, e.g., United States v. Eisenberg, 596 F.2d 522, 525 (2d Cir.), cert. denied, 444 US 843 (1979), the evidence established that Pearson furthered, promoted and cooperated in the conspiracy, United States v. Rush, slip op. 2003, 2007 (2d Cir. Mar. 20, 1981), in a variety of ways, including purchasing airline tickets, chauffeuring other conspirators on various errands in preparation for the trip to obtain the cocaine and helping the conspirator who was to carry the cocaine into the United States pick out clothes which would make him appear unsuspicious. In addition, there was testimony that Pearson was to receive the cocaine when it was brought into this country. Therefore, the evidence against Pearson was sufficient to support the jury's verdict. As to Pearson, the mandate of the Court shall issue forthwith.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the district court is affirmed.

/s/ THOMAS J. MESKILL, U.S.C.J.

/s/ RICHARD J. CARDAMONE, U.S.C.J.

/s/ JAMES S. HOLDEN, U.S.D.J.

Now, you as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified and whether impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to

which, if at all, each witness is either supported or contradicted by other evidence in the case.

Now, an accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice, like Mr. Adams, does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is always to be received with great caution and weighed with great care.

You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.

A defendant who wishes to testify, however, is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness.

The law permits a defendant, at his own request to testify on his own behalf. The testimony of individual defendants is before you. You must determine how far it is credible. The deep personal interest which every defendant has in the result of his case should be considered in determining the credibility of his testimony. You are instructed that interest creates a motive for false testimony; that the greater the interest the strong [sic] is the temptation, and that the interest of a defendant is of a character possessed by no other witness and is, therefore, a matter which may seriously effect [sic] the credence that should be given to his testimony.

However, I also charge you with equal force that a defendant's vital interest in the outcome of his trial is not inconsistent with his ability to render truthful testimony.